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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 535.

EDNA L. KEYES ET AL., *Petitioner,*

vs.

GLADEVIEW DRAINAGE DISTRICT, PALM BEACH COUNTY, FLORIDA, Public Debtor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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ARGUMENT.

The decision of the Court of Appeals for the Fifth Circuit is in accord with the applicable decisions of this Court, does not deprive petitioner of rights granted her by a Federal statute or the Constitution of the United States and does not involve an important Federal question. Further-

more, the relief petitioner seeks is barred by Rule 60(b) of the Federal Rules of Civil Procedure.

1. There is no conflict with this Court's decision in *Nassau Smelting & R. Works* v. *Brightwood B. Fdry Co.*, 265 U.S. 269. The *Nassau Smelting* case did not involve a municipal debt composition proceeding nor the provisions of Chapter IX of the Bankruptcy Act (11 USC, § 401-403), which are controlling here.

Petitioner's contention that the plan as approved by the District Court improperly provided that "creditors are required, in order to participate in the Plan, to file proofs of their claims * * * at the time designated by the Court" and that "only those creditors who have filed claims shall participate in the Plan" (R. 9-10) is without merit. The plan as approved is completely in accord with the provisions of Chapter IX of the Bankruptcy Act.

Congress authorized and in fact directed that creditors file proofs of claim by providing that "Upon approving the petition as properly filed, or at any time thereafter, the judge shall enter an order fixing a time and place for a hearing on the petition * * * and shall provide in the order that notice shall be given to creditors * * * *which shall specify the manner in which claims and interests of creditors shall be filed or evidenced*, on or before the date fixed for the hearing." Section 83(b) (11 USC, § 403(b)). (Emphasis supplied).

Congress further required in Section 83(f) of the Act (11 USC, § 403(f)) that:

> * * * the Court shall enter a final decree determining that the petitioner has made available for the creditors affected by the plan the consideration provided for therein and is discharged from all debts and liabilities dealt with in the plan except as provided for

> therein, *and that the plan is binding upon all creditors affected by it,* * * * *whether or not their claims have been filed or evidenced* * * * (Emphasis supplied).

This is precisely what the District Court here did (R. 58-60).

This Court has specifically held that the Act and its provisions for notice to creditors are constitutional. *United States* v. *Bekins*, 304 U.S. 27. Accordingly, plan adopted and approved in compliance with its terms is binding on all creditors who are given proper notice whether they appear and participate or not. *Poinsett Lumber & Mfg. Co.* v. *Drainage Dist. No. 7*, (8 Cir.) 119 F.2d 270; *San Augustine County* v. *Cameron County Water I. Dist.*, (5 Cir.) 202 F.2d 932.

Petitioner's complaints regarding the wisdom of the plan are ill timed; they were properly the subject of an appeal from the final decree itself. There is no question that the District Court had jurisdiction of the holder of petitioner's bonds throughout the composition proceedings and that the final decree in those proceedings was entered in accordance with due process of law. *San Augustine County* v. *Cameron County Water I. Dist.*, *supra*. That final decree is therefore binding on petitioner and cannot be belatedly attacked in these proceedings. See *Chicot Co. Drainage District* v. *Baxter State Bank*, 308 U.S. 371.

2. Petitioner's claim even if meritorious is barred by Rule 60(b) of the Federal Rules of Civil Procedure, which are clearly applicable to these proceedings. See *Norris* v. *Camp*, (10 Cir.) 144 F.2d 1; *Cromelin* v. *Markwalter*, (5 Cir.) 181 F.2d 948.

Rule 60(b) provides six separate grounds upon which a party may seek relief from a final decree. The only

conceivable ground under which petitioner might seek to qualify is for "any other reason justifying relief from the operation of the judgment".

This Court has stated however that only extraordinary circumstances will justify relief under Rule 60(b) (6) and such circumstances must be alleged and proved. *Ackerman* v. *United States*, 340 U.S. 193. Petitioner has neither alleged nor proved nor attempted to allege or prove any circumstances, much less extraordinary circumstances, such as would justify relief from the operation of the final decree in these composition proceedings. The mere fact that petitioner feels the final decree in the composition proceedings was erroneous "does not constitute 'any other reason justifying relief' ". *Elgin Nat. Watch Co.* v. *Barrett*, (5th Cir.) 213 F.2d 776, 779-780.

Not only must petitioner show extraordinary circumstances justifying relief from the operation of the final decree, which she has failed to do, but her application for relief must also have been made within a reasonable time. This was clearly not done here. No application was ever made until more than three and one-half years after the entry of the final decree and no attempt has ever been made to excuse this neglect (R. 92). The only possible thing to which petitioner could point is the illness of her mother, a former owner of the bonds in question, ending with her death shortly after the entry of the final decree.

But this will not excuse the complete inaction for over three years of petitioner herself or of the personal representative of her mother's estate (R. 92). Even more important and conclusive on this point, petitioner took absolutely no action to gain relief from the final decree for more than a year after she personally learned of the composition proceedings (R. 60, 72). There was not and could not be any excuse for this delay.

Under the circumstances it is clear that petitioner's application for relief from the final decree was not filed within a reasonable time which in itself is a sufficient basis for denying the petition for a writ of certiorari. This is particularly true where, as the record shows here, some of the new refunding bonds were negotiated, all of the lands within the District were sold and the tax levies to pay off the new bonds were fixed, all in reliance on the final decree in the composition proceedings (R. 96-97). This Court should be reluctant to disturb a final decree on the faith of which persons have created vested interests and irretrievably changed their positions as is the case here. See *Elgin Nat. Watch Co.* v. *Barrett*, *supra*, p. 779.

CONCLUSION.

The petition for a writ of certiorari is without merit and should be denied.

Respectfully submitted,

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